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Attorneys for Defendants
 MAXMILIAN ZARZANA, AND PINAKI
 CHAKRAVORTY (erroneously sued
 herein as "MAXNILIAN ZARZANA" and
 "PINAKI CHAKRAVORT")

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOWARD HERSHIPS,

Plaintiff,

v.

THE SUPERIOR COURT OF
 CALIFORNIA COUNTY OF SANTA
 CLARA, SANTA CLARA COUNTY
 DEPUTY DISTRICT ATTORNEYS
 MAXNILIAN ZARZANA, PINAKI
 CHAKRAVORT, STEVEN TODD
 KIRSCH, DAVID DUPERRAULT,
 GERALD SORENSON, PALO ALTO
 POLICE OFFICER CARLOS DE
 SANTIAGO, JOHN EVERDING AND
 DOES 1 through 20 inclusive,

Defendants.

No. 06-CV-6644 MJJ

**DEFENDANTS MAXMILIAN ZARZANA
 AND PINAKI CHAKRAVORTY'S
 REPLY TO PLAINTIFF'S OPPOSITION
 TO MOTION TO DISMISS, OR IN THE
 ALTERNATIVE STAY, PLAINTIFF'S
 FIRST AMENDED COMPLAINT**

Date: August 28, 2007

Time: 9:30 a.m.

Crtrm: 11, 19th Floor

Judge: Judge Martin J. Jenkins

Action Filed: October 25, 2006

I.

INTRODUCTION

Plaintiff Howard Hershships ("Hershships") is *currently* a defendant in a state court felony case, *People v. Hershships*, No. BB 517233 (2005) ("the Criminal Proceeding"). (First Amended Complaint ("FAC") at ¶ 3.) On April 9, 2007, Hershships filed the instant first amended complaint alleging that the Criminal Proceeding resulted from a vast conspiracy amongst a wide

1 variety of defendants. (FAC, ¶¶ 22-49.) On June 26, 2007, Defendants Santa Clara County
 2 Deputy District Attorneys Maxmilian Zarzana and Pinaki Chakravorty (“the County
 3 Prosecutors”) filed a motion to dismiss, or in the alternative stay, the instant complaint.
 4 Herships’ last day to serve the County Prosecutors with an opposition by mail was August 3,
 5 2007. (See Civil L. R. 5-5(a)(2), 7-3.) However, Herships failed to serve his opposition by mail
 6 until August 7, 2007. The County Prosecutors hereby reply to Herships’ untimely opposition.

7 II.

8 ARGUMENT

9 The County Prosecutors’ motion to dismiss should be granted— regardless of whether or
 10 not this Court considers Herships’ delinquent opposition. The County Prosecutors enjoy
 11 absolute immunity with respect to all of the allegations made against them. Herships’
 12 opposition fails to address the doctrine of absolute prosecutorial immunity. Instead, Herships
 13 cites two cases addressing the qualified immunity enjoyed by Presidential aides and police
 14 officers. Moreover, Herships offers no response to the County Prosecutors’ *Younger* abstention
 15 argument. Accordingly, Herships effectively concedes that the instant action should be
 16 dismissed, or stayed in the alternative, pursuant to *Younger v. Harris*. (See *Younger v. Harris*,
 17 401 U.S. 37 (1971); *Gilbertson v. Albright*, 381 F.3d 965, 982 (9th Cir. 2004).)

18 A. THE COUNTY PROSECUTORS ARE ENTITLED TO ABSOLUTE IMMUNITY.

19 The County Prosecutors are absolutely immune from liability based upon their decision to
 20 prosecute Herships. (See *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 1704 (2006).) In
 21 his opposition, Herships argues that the County Prosecutors are not entitled to absolute
 22 immunity because they initiated the Criminal Proceeding as part of a conspiracy with co-
 23 defendant Steve Kirsch. (Plaintiff’s Opposition to Defendants’ Motion to Dismiss
 24 (“Opposition”) at 4-5.) Herships argues that the County Prosecutors are not entitled to absolute
 25 immunity because they allegedly violated the law when they filed a criminal complaint against
 26 him. (*Id.*)

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1 However, the absolute prosecutorial immunity would apply even if the County Prosecutors
 2 violated the law by conspiring to prosecute Herships. “[I]n initiating a prosecution and in
 3 presenting the State’s case, the prosecutor is immune from a civil suit for damages under
 4 Section 1983.” (*Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)). In *Ashelman v. Pope*, the
 5 Ninth Circuit held the following:

6 [A] conspiracy between judge and prosecutor to predetermine the outcome of a judicial
 7 proceeding, while clearly improper, nevertheless does not pierce the immunity extended to
 8 judges and prosecutors.... Prosecutors are absolutely immune for quasi-judicial activities
 taken within the scope of their authority.

9 (*Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986).)

10 Herships cites two cases in an attempt to circumvent the doctrine of absolute prosecutorial
 11 immunity. Neither case is on point. In *Harlow v. Fitzgerald*, the U.S. Supreme Court held that
 12 *Presidential aides* are entitled to qualified immunity by virtue of their positions. (*Harlow v.*
 13 *Fitzgerald*, 457 U.S. 800, 809 (1982).) In *Malley v. Briggs*, the U.S. Supreme Court held that
 14 *police officers* are not entitled to absolute immunity when they request arrest warrants. (*Malley*
 15 *v. Briggs*, 457 U.S. 335, 344 (1986).) In both cases, the Supreme Court distinguished the
 16 absolute immunity enjoyed by prosecutors from the qualified immunity enjoyed by Presidential
 17 aides and police officers. (*Harlow*, 457 U.S. at 807; *Malley*, 457 U.S. at 341-342.)

18 According to his opposition, Herships intends to amend his complaint in order to describe
 19 how the County Prosecutors allegedly violated the California Penal Code when they filed
 20 charges against him. (Opposition at 5:21-25.) However, prosecutorial immunity would apply
 21 even if Herships amended his complaint in this fashion. “To be sure, this immunity does leave
 22 the genuinely wronged defendant without civil redress against a prosecutor whose malicious or
 23 dishonest action deprives him of liberty.” (*Imbler*, 424 U.S. at 427.)

24 **B. PURSUANT TO THE YOUNGER ABSTENTION DOCTRINE, HERSHIPS’**
 25 **COMPLAINT SHOULD BE DISMISSED, OR STAYED IN THE ALTERNATIVE.**

26 The instant complaint should be dismissed or stayed pursuant to the *Younger* abstention
 27 doctrine. Generally, the *Younger* abstention doctrine prohibits federal courts from interfering
 28 with pending state court proceedings. (*Younger*, 401 U.S. 37.) *Younger* abstention applies

1 herein because the instant action arises from an *ongoing* criminal proceeding in state court.
 2 (FAC, ¶ 3). Dismissal is appropriate to the extent Herships seeks injunctive relief in the instant
 3 action, while a stay is appropriate to the extent he seeks damages. *Gilbertson*, 381 F.3d at 982.
 4 Therefore, the instant action should be dismissed, or stayed in the alternative.

5 Herships makes no reference to the County Prosecutors' *Younger* abstention argument in
 6 his opposition. As such, he effectively concedes that the instant complaint should be dismissed
 7 or stayed in the alternative.

8 III.

9 CONCLUSION

10 The County Prosecutors respectfully request that the instant complaint be: 1) dismissed as
 11 to them under the absolute immunity doctrine; 2) dismissed under the *Younger* abstention
 12 doctrine; and/or 3) stayed pursuant to *Gilbertson v. Albright* and the *Younger* abstention
 13 doctrine.

14 Dated: August 15, 2007

Respectfully submitted,

ANN MILLER RAVEL
 County Counsel

17 By: /S/
 18 KEVIN M. HAMMON
 Deputy County Counsel

19 Attorneys for Defendants
 20 MAXMILIAN ZARZANA, and
 21 PINAKI CHAKRAVORTY
 (erroneously sued herein as
 22 "MAXNILIAN ZARZANA" and
 23 "PINAKI CHAKRAVORT")
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PROOF OF SERVICE BY MAIL

Herships v. The Superior Court of California, et al.

06-6644 MJJ

I, Catherine M. Grijalva, say:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding, East Wing, 9th Floor, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of **DEFENDANTS MAXMILIAN ZARZANA AND PINAKI CHAKRAVORTY'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE STAY, PLAINTIFF'S FIRST AMENDED COMPLAINT** by placing said copy in an envelope addressed to:

Howard Herships
P.O. Box 190711
San Francisco, CA 94119-0711

which envelope was then sealed, with postage fully prepaid thereon, on **August 15, 2007**, and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, on the above-referenced date in the ordinary course of business; there is delivery Service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **August 15, 2007**, at San Jose, California.


Catherine M. Grijalva

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